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# Copyright Reform for Canada: What Should We Do?, Copyright Consultations Submission

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# COPYRIGHT REFORM FOR CANADA: WHAT SHOULD WE DO?\*

## COPYRIGHT CONSULTATIONS SUBMISSION

Barry Sookman<sup>\*</sup>

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*This submission elucidates 8 basic principles, and 11 pragmatic recommendations to guide copyright reform. Canadian copyright reform is long overdue, especially in comparison to the progress made in other jurisdictions. The modernization proposed herein is in the public interest as it aims to better protect creators' rights so as to foster innovation, creativity, competition, and investment and position Canada as a leader in the global, digital economy.*

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In July 2009 the Canadian government launched a nationwide consultation on copyright modernization. It asked Canadians five questions about the changes that should be made to the *Copyright Act*<sup>1</sup> to best foster innovation, creativity, competition, and investment

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<sup>1</sup> [Copyright Act](#), R.S.C., 1985, c. C-42 [*Copyright Act*]. Unless stated otherwise, all references to an "Act" are to the *Copyright Act*.

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and position Canada as a leader in the global, digital economy.<sup>2</sup> In this essay I will address these questions by presenting a series of principles and specific recommendations for reform.

## BACKGROUND TO COPYRIGHT REFORM

To understand the need for copyright reform in Canada, some background knowledge is essential. For more than a decade, copyright reform has been studied and debated, but Canada has nothing to show for it. Meanwhile, Canadians have had to endure outdated laws that do not adequately support the digital exploitation of creative products. Canada's outdated laws have hurt all sectors of the creative industries, including the creators and artists who rely on copyright for protection. These laws have also diminished Canada's international reputation among the G8 and other trading partners.

Canada has acknowledged since 1997 that it needs to adapt its laws to address digital technologies and the Internet. That year it signed the 1996 World Intellectual Property Organization (WIPO) Treaties.<sup>3</sup> Since then, at least 12 government, department, and committee reports have studied and made recommendations for reform to address digital issues. The two departments responsible for copyright, Industry Canada and Canadian Heritage, have consulted extensively with Canadian creators, businesses, experts, and citizens about reform.<sup>4</sup> In addition to formal consultations, there were

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<sup>2</sup> The questions were as follows: How should existing copyright laws be modernized? How should copyright changes be made in order to withstand the test of time? What sorts of changes would best foster innovation and creativity in Canada? What sorts of copyright changes would best foster competition and investment in Canada? What kinds of changes would best position Canada as a leader in the global digital economy? The complete questions may be found at <<http://copyright.econsultation.ca/topics-sujets/show-montrer/6>>.

<sup>3</sup> *WIPO Copyright Treaty*, 20 December 1996, 36 ILM 65 ; *WIPO Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76. Canada played an active and significant role in negotiating these treaties and thus, even before 1996, recognized the need to update its laws to deal with digital issues.

<sup>4</sup> A brief list of the consultations undertaken is as follows: Canadian Electronic Commerce Strategy (1998); Discussion Paper on the Implementation of the WIPO Copyright Treaty (1998); Discussion Paper on the Implementation of the WIPO Performances and Phonograms Treaty (1998); A Framework for Copyright Reform (2001); Consultation Paper on Digital Copyright Issues (2001); Focus Paper (Digital

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significant meetings of stakeholders in 2005 and 2008 following the first readings of Bill C-60<sup>5</sup> and Bill C-61<sup>6</sup> – bills that were introduced into Parliament to amend the *Copyright Act* but which never proceeded past that stage.<sup>7</sup>

In 2004 the Standing Committee on Canadian Heritage recommended reforms to the Act.<sup>8</sup> In 2007 two all-party government committees examining counterfeiting and piracy problems noted significant deficiencies in Canadian law and made important recommendations to address them.<sup>9</sup> In 2008 the government's Competition Policy Review Panel urged reforms to bring Canada's laws into the Internet era.<sup>10</sup>

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Copyright Issues) (2002); Supporting Culture and Innovation (s. 92 Report) (2002); Government Statement on Proposals for Copyright Reform (2004); Status Report on Copyright Reform (2004); Technological Protection Measures (2-part Heritage Canada paper, 2004); Standing Committee on Public Safety and National Security, Counterfeit Goods in Canada – A Threat to Public Safety (May 2007) ("Public Safety Report"); Standing Committee on Industry, Science and Technology, Counterfeiting and Piracy Are Theft (June 2007) ("Industry Report").

<sup>5</sup> [Bill C-60](#), *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005. [Bill C-60].

<sup>6</sup> [Bill C-61](#), *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008. [Bill C-61].

<sup>7</sup> The bills did not proceed to second reading because the minority governments in power at the time were dissolved.

<sup>8</sup> Canada, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (Ottawa: Public Works and Government Services Canada, 2004).

<sup>9</sup> Canada, Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy are Theft* (Ottawa: Communication Canada Publishing, 2007); These reports were the result of extensive hearings that canvassed the views of Canadian businesses, intellectual property experts, trade associations, and enforcement officers. The committees made numerous specific recommendations, including that Canada enact legislation to ratify the WIPO Treaties; strengthen civil remedies for counterfeiting and piracy infringements; and provide the Canada Border Services Agency (CBSA) and law enforcement officials with the express authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative and in accordance with due process and Canadian law.

<sup>10</sup> Canada, Competition Policy Review Panel, *Compete to Win - Final Report - June 2008* (Ottawa: Public Works and Government Services Canada, 2008); The panel noted that the importance of the Internet to all aspects of economic activity "has brought new urgency to updating IP frameworks in Canada." It urged the government to seize the opportunity to develop a strong IP capacity and to "demonstrate to the world how competition and productivity can be furthered by a modern IP regime." It observed that "[t]here is no reason for Canada's patent and copyright frameworks not to be 'state of the art' for the Internet age." Canadian

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Successive Canadian governments have acknowledged the need to modernize the Act and signalled that reforms were forthcoming. In 2007 the government, through four Cabinet ministers, acknowledged the importance of copyright in promoting innovation and attracting investment and committed to legislative reform, including implementation of the WIPO Treaties.<sup>11</sup> In 2008 Canada committed through a multilateral declaration to modernize its laws to deal with digital issues.<sup>12</sup> Three throne speeches since the turn of the millennium have promised reform.<sup>13</sup>

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businesses have also recognized the need for stronger and better enforcement of copyrights in Canada. Businesses have made specific recommendations for reforms. See Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*, March 2007 (“*A Road Map for Change*”); Ontario Chamber of Commerce, *Protection of Intellectual Property: A Case for Ontario*, December 2007; Canadian Chamber of Commerce and the Canadian Intellectual Property Council, *A Time for Change: Toward a New Era for Intellectual Property Rights in Canada*, February 2009.

<sup>11</sup> Canadian Government, *Government Response to the Eighth Standing Committee on Industry, Science and Technology* by Minister of Industry Jim Prentice, Minister of International Trade David Emerson, Minister of Public Safety Stockwell Day, and Minister of Justice and Attorney General Rob Nicholson (Ottawa, 2007); The ministers were responding to the two federal government committees examining counterfeiting and piracy problems in Canada. They stated that the government was “committed to the importance of providing a robust framework for intellectual property rights ... to foster an environment conducive to innovation, in an effort to further attract investment and high paying jobs to this country’s growing knowledge-based economy.” They also stated that the “Government ... is working towards bringing Canada’s copyright regime into conformity with the World Intellectual Property Organization (WIPO) Internet Treaties.”

<sup>12</sup> Organization for Economic Co-Operation and Development (OECD), *The Seoul Declaration for the Future of the Internet Economy* (Seoul: 17-18 June 2008); When Canada signed the declaration it agreed to “[e]nsure respect for intellectual property rights” and committed to “[c]ombine efforts to combat digital piracy with innovative approaches which provide creators and rights holders with incentives to create and disseminate works in a manner that is beneficial to creators, users and our economies as a whole.” See also Joint Statement by North American Leaders, August 10, 2009: “We will cooperate in the protection of intellectual property rights to facilitate the development of innovative economies.”

<sup>13</sup> In 2001 the government promised to “provide better copyright protection for new ideas and knowledge [to] ensure that Canadian laws and regulations remain among the most modern and progressive in the world, including those for intellectual property and competitiveness.” The Throne Speech of October 2007 made a similar pledge: “Our Government will improve the protection of cultural and intellectual property rights in Canada, including copyright reform.” The November 2008 Throne Speech stated: “Cultural creativity and innovation are vital not only to a lively

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In the absence of a certain and effective legal regime protecting digital copyright, Canadian creative industries suffer disproportionately from online infringement. The use of peer-to-peer (P2P) networks is extensive in Canada, and unauthorized file sharing of copyrighted material is widely acknowledged to account for a large part of P2P activity.<sup>14</sup> Canada is viewed as a country in which laws to address digital piracy are weak, ineffective, or non-existent. Canada is home to some of the world's most popular online illegitimate file-sharing Internet sites.<sup>15</sup> Many sites or information sources about them claim they have moved to Canada to more easily and legally conduct business.<sup>16</sup> These sites facilitate a staggering amount of unauthorized

Canadian cultural life, but also to Canada's economic future." It went on to commit the government to "proceed with legislation to modernize Canada's copyright laws and ensure stronger protection for intellectual property."; See *Speech from the Throne to open the First Session of the Thirty-Seventh Parliament of Canada* (16 October 2007); See also *Speech from the Throne to open the Second Session of the Thirty-Ninth Parliament of Canada* (18 November 2008).

<sup>14</sup> In 2005 the OECD determined that, weighted by population, Canada had the greatest file-sharing population anywhere on the planet. Organisation for Economic Co-operation and Development, Working Party on the Information Economy, *Digital Broadband Content: Music*, DSTI/ICCP/IE(2004)12/FINAL (13 December 13, 2005,) at 75. International Federation of the Phonographic Industry (IFPI), *Digital Music Report* 2009 at 22–23.

<sup>15</sup> For example, one of the world's largest illegitimate BitTorrent sites, [isoHunt](#), is operated from Canada. It sued the record industry in Canada for a declaration that it can legally carry out its P2P file-sharing services without infringement here. BTMon is another BitTorrent site operating from Canada. Illegitimate user-generated-content sites such as [video.ca](#), illegitimate leech sites such as [free-tv-video-online](#), and illegitimate services offering access to pirated tv, movies, and other content also operate from Canada.

<sup>16</sup> Thomas Menneck, "isoHunt Celebrates 6 years online" (5 January 2009), online: Slyck.com <<http://www.slyck.com/news.php?story=1817>> ("In February of 2006, isoHunt and TorrentSpy were the recipients of a copyright infringement complaint from the MPAA (Motion Picture Association of America). TorrentSpy eventually shut down and was forced to accept a \$100 million settlement; however, because isoHunt is situated in Canada, it has been able to hold authorities at bay for significantly longer."); Wikipedia, "BtJunkie", online: Wikipedia Online Encyclopedia <[http://en.wikipedia.org/wiki/Btjunkie#cite\\_note-1](http://en.wikipedia.org/wiki/Btjunkie#cite_note-1)> ("BT Junkie is an advanced BitTorrent search engine. It uses web crawler to search for torrent files from other torrent sites and services in its database. It has over 2,180,000 active torrents and about 4,200 torrents added daily (compared to runner-up Torrent Portal with 1,500), making it the largest torrent site indexer on the web. BT Junkie has moved to Canada for legal reasons."); TorrentPortal, a BitTorrent index site at <<http://www.torrentportal.com>> is registered to a person in Vancouver and states: "Unless you live in Canada, downloading copyrighted material via P2P may put you

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file sharing<sup>17</sup> and operate for profits earned through online advertising or subscription fees.<sup>18</sup> The only persons who profit, however, are their operators.

Piracy of software is also a major problem in Canada. The IDC (International Data Group) estimated that Canada had a piracy rate of 32 percent, 12 percent higher than the United States.<sup>19</sup> Piracy of entertainment software is also reported to be significantly higher in Canada than in the United States.<sup>20</sup> Physical piracy is facilitated

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at risk for a lawsuit. Canadian users are currently shielded from P2P lawsuits. Canada signed the 1997 World Intellectual Property Organization Internet Treaties, but has not yet ratified them by enacting their provisions into domestic law.” An explanation of torrents in Net for Beginners on About.com at [http://netforbeginners.about.com/od/peersharing/a/torrent\\_search.htm](http://netforbeginners.about.com/od/peersharing/a/torrent_search.htm), states: “Warning for new users: while P2P file sharing technology is completely legal, many of the files traded through P2P are copyrighted. *Unless you live in Canada where users are shielded from P2P lawsuits, then downloading P2P files may put you at risk for a civil lawsuit in any other country*” (emphasis in original). About.com also explains at <http://netforbeginners.about.com/b/2004/04/13/now-legal-in-canada-downloading-mp3-music-files.htm> “Even though Napster 1.0 has been shut down by American law, it is now legal to download free music if you are in Canada. Millions of people upload and download billions of songs each week, without paying a cent, and as of March 2004, Canadians cannot be prosecuted for this file trading,” and Iwannadownload.com at <http://www.iwannadownload.com/learnmore.html>, declares: “Canadian Server Location – Completely Legal.” The hosting provider Moxie communications refused to stop providing services to the pirate BitTorrent site BTMon on the assertion that such sites are legal in Canada. See also <http://torrentfreak.com/cria-launches-assault-on-major-bittorrent-trackers-080527/>: “We will not be following the request and will be fighting for the rights of our clients[,] as to date laws in Canada protect them.”

<sup>17</sup> For example, on July 8, 2009, there were 85.25 million files with a combined size of 2719.62 tera-bytes being shared by 23.82 million peers on isoHunt.

<sup>18</sup> For instance, see Gillian Shaw, “Court ruling on isoHunt could have huge ramifications, says founder,” *Vancouver Sun*, (1 May 1 2009) where isoHunt founder Gary Fung admits he profits from advertising on the site: “Right now I have to say it is a business. We have to make money to sustain our business, and to sustain the lawsuits that are costing quite a bit.”

<sup>19</sup> International Data Group, *Sixth Annual BSA-IDC Global Software 2008 Piracy Study* (May 2009) (According to the IDC, the monetary value of unlicensed software grew to \$53 billion in 2008).

<sup>20</sup> Entertainment Software Association of Canada, online, <http://www.theesa.ca/facts/index.asp> (According to the Entertainment Software Association of Canada, piracy in this industry is estimated to cost the U.S. and Canadian entertainment software industries more than \$3.5 billion annually, excluding Internet piracy. Industry investigations found that an alarming 20–30 percent of retail specialty stores visited in Toronto and Vancouver sell pirated

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through Canada's weak border measures, which do not conform to the international standards established by the World Customs Organization.<sup>21</sup>

Canada's weak laws and the extent of the piracy here have been significant sources of discontent for Canada's trading partners. The European Union (EU) recently identified crucial weaknesses in Canada's intellectual property (IP) framework.<sup>22</sup> In 2009 the U.S. Trade Representative (USTR) added Canada to the Priority Watch List in its annual Special 301 Report because of its weak IP laws and weak enforcement system.<sup>23</sup> Further, Canada has been singled out by members of the United States Congress and by U.S. vice president Joe Biden for not taking meaningful steps to update its copyright laws,<sup>24</sup> leading the U.S. Congressional International Anti-Piracy Caucus to place Canada on its 2009 International Piracy Watch List.<sup>25</sup> Canada's

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products. In Canada, approximately 34 percent of gamers have acquired pirated games, compared to 17 percent in the United States. On average, 22 percent of pirates' video-game collections are illegal. Approximately 22 percent of gamers have modified their consoles or handhelds to play pirated games).

<sup>21</sup> Unlike customs authorities in other major industrialized nations, the Canada Border Services Agency officers are not empowered to seize or destroy counterfeit or pirated goods. Instead, customs officers will detain (for a limited period of time) counterfeit or pirated goods only if the IP holder has obtained a court order or if the RCMP or local police officers agree to seize the goods.

<sup>22</sup> European Commission and the Government of Canada, *Assessing the Costs and Benefits of a Closer EU-Canada Partnership* (October 2008) at 87–88.

<sup>23</sup> International Intellectual Property Alliance (IIPA), *2009 Special 301 Report* at 17: "The United States continues to have serious concerns with Canada's failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997. We urge Canada to enact legislation in the near term to strengthen its copyright laws and implement these treaties. The United States also continues to urge Canada to improve its IP enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the volume of infringing products transshipped and transiting through Canada. Canada's weak border measures continue to be a serious concern for IP owners."

<sup>24</sup> Declan McCullagh, "Biden Promises 'right person' as new U.S. copyright czar", *CNet news* (21 April 2009), online: CNet News <[http://news.cnet.com/8301-13578\\_3-10224689-38.html](http://news.cnet.com/8301-13578_3-10224689-38.html)>.

<sup>25</sup> The caucus states that: "Canada has regrettably become known as a 'safe haven' for Internet pirates. There is an urgent need for amendments to the Copyright Act in order to comply with the World Intellectual Property Organization (WIPO) Internet Treaties. This includes provisions that prohibit circumvention of technological copyright protection measures and trafficking in circumvention devices, and proposals to ensure that copyright owners can effectively combat online piracy by enacting an effective legal framework governing Internet Service Provider (ISP)



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world rankings in indexes that measure the state of our copyright laws are also slipping measurably.<sup>26</sup>

In short, Canada's copyright reform is long overdue and much needed.

## HOW CANADA SHOULD APPROACH COPYRIGHT REFORM

I will now answer the questions posed by the Canadian government with a series of principles and specific recommendations.

### EIGHT PRINCIPLES TO GUIDE COPYRIGHT REFORM

#### I. *Recognize the importance and the unique characteristics of the creative sector*

The cultural sector is integral to Canada's creative economy and overall economic performance.<sup>27</sup> The Conference Board of

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liability and responsibility. Canada's enforcement record also falls short of what should be expected of our neighbor and largest trading partner, primarily due to the following: ineffective border controls, inadequate enforcement resources and policies, and a seeming unwillingness to impose deterrent penalties on copyright pirates. Canadian parliamentary leaders and government officials, at the highest levels, have acknowledged many of these deficiencies, but have done little to address them." Congressional International Anti-Piracy Caucus, "2009 Country Watch List," May 2009.

<sup>26</sup> See Taylor Wessing, *Global Intellectual Property Index 2009* (May 2009): "Canada has suffered the greatest fall in GIPI 2, both in rank and rating. It has attracted numerous adverse comments, such as having 'ineffective border controls,' 'insufficient enforcement resources,' 'inadequate enforcement policies' and an 'unwillingness to impose deterrent penalties on pirates.' In a pending case, an ISP has considered the regime sufficiently benign to sue a rights-holder in the Canadian court for a decision on whether search engines should be held accountable for copyright infringement (isoHunt Web Technologies Inc. v. Canadian Recording Industry Association). *World Economic Forum Global Competitiveness Report 2008–2009*: Canada's ranking in the Intellectual Property Protection category fell from 15 to 19, and is marked as a "competitive disadvantage."

<sup>27</sup> Conference Board of Canada, *Valuing Culture: Measuring and Understanding Canada's Creative Economy* (August 2008) at 8 (According to the board, the cultural sector includes written media, the film industry, broadcasting, sound recording and music publishing, performing arts, visual arts, crafts, architecture, photography, and

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Canada estimated that the real value-added output by the Canadian cultural industries totalled \$46 billion in 2007, representing 3.8 percent of total gross domestic product (GDP). The economic footprint when including the direct, indirect, and induced effects were estimated to total \$84.6 billion, about 7.4 percent of total real GDP in 2007.<sup>28</sup>

From an economic perspective, the value of cultural products lies in their content. They are protected from unlawful reproduction mainly by copyright laws.<sup>29</sup> As public goods, they can be copied at a very low cost, which makes free-riding (piracy) easy.<sup>30</sup> Consequently, a high level of legal protection for this sector is essential.

## II. *Establish specific goals for a “Digital Canada” copyright framework*

Canada should follow the lead of the United Kingdom, which aims to be a global center for the creative industries as part of its “Digital Britain” initiative.<sup>31</sup> After a series of probing studies, the UK government concluded that it needed “a digital framework for the creative industries and a commitment to these industries grounded in the belief that they can be scaled and industrialised in the same way as other successful high-technology, knowledge industries.”

The Government considers online piracy to be a serious offence. Unlawful downloading or uploading, whether via peer-to-peer sites or other means, is effectively a civil form

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design but not software or most elements of interactive media (which are generally considered part of the information and communications technology (ICT) sector)).

<sup>28</sup> The Conference Board estimates that for every \$1 of real value-added GDP produced by Canada’s cultural industries, roughly \$1.84 is added to overall real GDP.

<sup>29</sup> Statistics Canada, *Definition: Information and Cultural Industries*, online: <<http://www.ic.gc.ca/cis-sic/cis-sic.nsf/IDE/cis51defe.html>>.

<sup>30</sup> In a hypothetical extreme situation where everyone free rides, investors would not be able to appropriate any returns, and investment in creative contents would cease. See United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing* (July 2008) at 47; See also Paul Chwelos, “Assessing the Economic Impacts of Copyright Reform on Internet Service Providers,” *Report Prepared for Industry Canada* (November 2003) at 20–21.

<sup>31</sup> See United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain – Final Report* (June 2009). [U.K., “Digital Britain”]

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of theft. This is not something that we can condone, or to which we can fail to respond. We are therefore setting out in this report a clear path to addressing this problem which we believe needs to result in a reduction of the order of 70–80% in the incidence of unlawful filesharing.<sup>32</sup>

UK government studies found that the scale of unlawful P2P file sharing in that country had resulted in considerable losses to its creative industries.<sup>33</sup> The government unequivocally determined that this situation was “unacceptable” and committed to addressing it with a specific goal of reducing online piracy by 70–80 percent. It proposed a series of measures to bring all stakeholders together to create an effective online marketplace for digital creative products.<sup>34</sup> Canada should be no less determined to help boost its cultural industries by establishing similar targets and policies to reduce digital piracy.

III. *Provide effective digital copyright protection to stimulate intellectual creation and dissemination of cultural products*

It is well accepted among Canada’s trading partners that effective copyright protection is crucial to the creation and dissemination of intellectual works. Copyright promotes creativity that benefits authors, producers, consumers, and the public at large. Our partners know, as should we, that a rigorous, effective system for the protection of copyright fosters progress and innovation, encourages investment, promotes growth, and increases competitiveness of the creative industries.<sup>35</sup>

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at para. 17.

<sup>34</sup> *Ibid.* at para 18.

<sup>35</sup> Commission of the European Communities, *Copyright in the Knowledge Economy: Green Paper* (2008) at 4; Government of the United Kingdom, *UK Government Response to the European Commission’s Green Paper – Copyright in the Knowledge Economy*, (December 2008).

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IV. *Provide clear, predictable, and fair rules that support creativity and innovation*

The copyright system is the framework through which creative efforts are rewarded. It provides an incentive for people to create and innovate. It is the backdrop against which decisions on investment and jobs are made in the creative sector.<sup>36</sup> All nations have their own culture, but the creation of mass-market cultural products has little hope of developing without effective copyright. Copyright decentralizes control over decisions about producing and paying for creative works. Exclusive rights and the consequent ability to license authorized uses, and to preclude unlicensed uses, foster economic independence, greater economic and creative opportunities, and experimentation among business models. It provides businesses with the resources they need to make investments and obtain financing. Copyright allows organizations such as film studios, video game developers, book publishers, and record labels to invest time and resources to identify and develop new talent. A framework that provides a high level of legal protection for copyrights has the potential to unleash the initiative and creativity of individuals.<sup>37</sup>

Our trading partners accept that a strong rule of law is vital for the cultural industries.<sup>38</sup> No other set of institutional

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<sup>36</sup> Government of the United Kingdom, *UK Government Response to the European Commission's Green Paper – Copyright in the Knowledge Economy*, (December 2008); Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (World Intellectual Property Organization, 231) [Idris]; European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, *Directive 2001/29/EC*, Recitals 4, 5, 9, 10, 11 (May 2001); European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, *Directive 2004/48/EC*, Recital 3 (April 2004).

<sup>37</sup> Mark Schultz and Alec van Gelder, "Creative Development: Helping Poor Countries by Building Creative Industries," (2008) Kentucky L.J. 79; United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing* (July 2008) at s. 7.4; Anne Chandima Dedigama et al., *International Property Rights Index (IPRI) 2009 Report*, Property Rights Alliance (2009); In addition to the economic value of these industries to the Canadian economy, consumers of music, film, theatre, books, and other cultural properties also gain considerable cultural value and enjoyment from these creative works.

<sup>38</sup> U.K., "Digital Britain", *supra* note 31 at para. 17.

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arrangements is sufficient to support commercial cultural industries of the scope and depth of those that historically have existed.

V. *Reform and adapt copyright laws to reduce digital piracy and to promote investment and economic growth in creative products*

Digital piracy – in particular, online file sharing over P2P networks – causes significant losses to the creative industries.<sup>39</sup> These losses are felt not only by producers of content, such as producers of records, books, software, and motion pictures, but by everyone directly or indirectly involved in these industries.<sup>40</sup> These losses represent only a fraction of the total damage to the economy from digital piracy. The indirect and induced effects on an economy-wide basis are far higher.<sup>41</sup>

Opponents of copyright reform argue that the law cannot be reformed to prevent or seriously reduce online piracy. Some advocate abandoning copyright in favour of other compensation models.<sup>42</sup> Others argue for weakened protections, contending that better reforms won't work or that the benefits would not exceed the perceived drawbacks.<sup>43</sup>

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<sup>39</sup> These losses are not countered by the “network effects” or “sampling effects.” United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-Sharing* (July 2008) at 13; Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy* (March 2009) at s. 2.2.1; Stan J. Liebowitz, “File Sharing: Creative Destruction or Just Plain Destruction?” (2006) 49 J.L. & Econ. 24; Stan J. Liebowitz, “Testing File-Sharing’s Impact by Examining Record Sales in Cities,” (April 2006), online: <<http://ssrn.com/abstract=829245>>; Paul Chwelos, “Assessing the Economic Impacts of Copyright Reform on Internet Service Providers,” *Report Prepared for Industry Canada*, (November 2003) at 1, 23.

<sup>40</sup> Darrell Panethiere, “The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development”, UNESCO Global Alliance for Cultural Diversity, UNESCO Doc. CLT/ACE/CEC-05/09 (2005) at 13–14.

<sup>41</sup> Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy* (March 2009).

<sup>42</sup> See Barry B. Sookman, “The SAC Proposal for the Monetization of the File Sharing of Music in Canada: Does It Comply with Canada’s International Treaty Obligations related to Copyright?” (2008) 1 Osgoode Hall Rev.L.Pol’y 101 (reviewing the Songwriters of Canada proposal) [Sookman, “SAC Proposal”].

<sup>43</sup> *Infra* note 50.

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However, studies carried out in countries that have modernized their copyright laws have demonstrated that effective copyright protection and enforcement of rights does reduce digital piracy and bring about significant direct and indirect economic benefits. Surveys conducted in the United Kingdom found that a warning notification email from an Internet service provider (ISP) would persuade 33 percent of downloaders to cease unauthorised downloading. Moreover, 70–80 percent of downloaders would permanently stop if they believed sanctions could be imposed if they did not comply.<sup>44</sup>

Studies have also established that reforming copyright laws to deal with digital piracy has economic benefits. Based on research, the UK government calculated that if a graduated response system was established, industry annual revenues there would increase by approximately £200 million per annum, and tax revenues by approximately £35 million.<sup>45</sup> Another recent UK study determined

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<sup>44</sup> United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing* (16 June 2009), quoting Wiggin LLP – 2008 Digital Entertainment Survey and empirical experience of the US; Other sources indicate the same, see generally: Nate Andersen, “Stern Letters from ISPs Not Enough to Stop P2P Use After All,” *Ars Technica*, June 10, 2009; BBC News, “Piracy Law Cuts Internet Traffic,” April 2, 2009; Internet traffic in Sweden dropped by 33 percent when the country’s new anti-piracy laws came into effect. CET, “Swedish Anti-piracy Law Keeps Downloaders on the Defensive,” August 4, 2009, [www.thelocal.se/21092/20090804](http://www.thelocal.se/21092/20090804); “Sweden’s legislation, based on the European Union’s Intellectual Property Rights Enforcement Directive (IPRED), is credited with a 30 percent fall in the country’s total web traffic the day after it came into effect. Experts say that the drop in Swedish web usage is explained by the fact that illegal downloading represents between 50 and 75 percent of Internet traffic worldwide ... Some popular Swedish artists have seen their downloading on websites like The Pirate Bay go down by up to 80 percent ... While unauthorized downloads are on the slide at a time when global record sales are booming, the amount of music bought from legal download sites ha[s] shot up by 57 percent compared to last year ... No one could predict such a dramatic decrease in illegal traffic and not only that there’s also been a huge increase in the legal services.” CET, “Spotify earns us more than iTunes’: Sony BMG,” August 11, 2009, <http://www.thelocal.se/21246/20090811/>; “The convictions of four people behind The Pirate Bay on charges of being accessories to copyright infringement in April [2009], as well as the passing of tough new anti-piracy legislation, have led to a dramatic fall in internet traffic, attributed to a decline in illegal file-sharing.”

<sup>45</sup> United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing* (16 June 2009) at 46–47.

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that reforming UK's laws to provide a better anti-piracy legal framework would provide direct gross revenue benefits to the audio-visual sector of £268 million as well as benefits spread throughout the entire UK economy via multiplier effects, creating a total of £614 million in revenues to all industries, £310 million in GDP, 7,900 jobs, and £155 million in taxes to government. It also determined that the establishment of a graduated response system<sup>46</sup> alone would yield additional industry revenues of £141.7 million.<sup>47</sup>

Canada's trading partners are basing their copyright policies on the clear link between anti-piracy reforms and economic progress. So should Canada.

VI. *Reform and adapt copyright laws with new exceptions in accordance with international standards and treaties*

Exceptions to copyright are an indispensable complement to exclusive rights. Together, they form an important balance between authors' rights and the interests of users.<sup>48</sup> Accordingly, along with recalibrating exclusive rights to address digital issues, there is also a need to revisit exceptions to ensure that they remain appropriate for the 21st century.

In considering what proposed exceptions are appropriate, the government should subject each one to the internationally accepted three-step test mandated by the Berne Convention, Trade-Related Aspects of Intellectual Property (TRIPS), and NAFTA.<sup>49</sup> This test

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<sup>46</sup> A graduated response system is a system of warnings delivered to a user by an ISP, followed by a series of measures applied by the ISP which would prevent continued unauthorized activity.

<sup>47</sup> Oxford Economics, *Economic Impact of Legislative Reform to Reduce Audio-Visual Piracy* (March 2009) at s. 3.3.

<sup>48</sup> *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 17 CPR (4th) 161 (SCC).

<sup>49</sup> For examples of the application of these norms to proposals for copyright reform in Canada, see Wanda Noel et al., "Free v. Fee," (2006) 1 C.I.P.R. 23; Sookman, "SAC Proposal" *supra* note 42. (Numerous submissions have been made to the government for new exceptions. Many of these requests focus solely on the claimed advantages of the exception without subjecting the request to any framework that balances the claimed benefits against the economic consequences to rights holders). [Berne Convention for the Protection of Literary and Artistic Works](#), Sept. 9, 1886; revised July 24, 1971 and amended 1979, 1 B.D.I.E.L. 715 [*Berne Convention*]; [Agreement on Trade-Related Aspects of Intellectual Property Rights](#), 15 April 1994, 33 I.L.M. 1197

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permits exceptions to be made in special cases that are narrow in scope and reach, can be justified by sound policy rationale, and do not undermine a present or future market for the work or unreasonably prejudice the legitimate interests of the author.<sup>50</sup>

VII. *Do not regard copyright reform as a “zero-sum game” or succumb to the philosophy of unrestricted “user rights”*

It is often said that copyright law should promote a balance between creators and users. The idea of “balance” has been misinterpreted and misrepresented by anti-copyright advocates as suggesting that copyright reform is a zero-sum game – that stronger protection for creators makes things worse for consumers and that any “gain” by producers must result in a corresponding “loss” by users.<sup>51</sup> This notion is not true. Copyright plays an important role in ensuring a broad array of choices for consumers by providing the proper incentives for long-term investment in creativity and innovation.

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[*TRIPS*]; [North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States](#), 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

<sup>50</sup> Under this test, each of the following conditions must be met: the exception is limited to “certain special cases” – it must be “clearly defined,” narrow in scope and reach, and justified on a sound policy rationale; the act does not conflict with a normal exploitation of the work – all forms of exploiting a work that have, or are likely to acquire, considerable economic or practical importance cannot be an exception; and the exception “does not unreasonably prejudice the legitimate interests of the author” – this condition is not met if an exception unreasonably deprives the copyright owner of the right to enjoy and exercise the exclusive right as fully as possible, or where it causes or could cause an unreasonable loss of income to the copyright owner; See generally WIPO, *WIPO Guide to the Copyright and Related Rights Treaties Administered* (2003), CT-10.2; *United States – Section 110(5) of the U.S. Copyright Act*, WTO Report of the Panel, WT/DS160/R, June 15, 2000, paras. 6.177–83, 6.220–29.

<sup>51</sup> See, for example, the sites operated by Professor Michael Geist, <http://www.michaelgeist.ca> and <http://speakoutoncopyright.ca>; and by Howard Knopf, <http://excesscopyright.blogspot.com>. See also [www.ccer.ca](http://www.ccer.ca), “Canadian Coalition for Electronic Rights.” This coalition’s members include sellers of circumvention devices such as “mod chips” for video game consoles and unlocking software and services for iPhones. Not surprisingly, it advocates for no laws against circumvention of technological protection measures (TPMs) and expanding the backup exception to cover all digital products.



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These incentives result in the availability of creative products for consumers, thereby promoting the public interest in the creation and dissemination of creative works.

These opponents attack copyright as a negative force and attempt to demonize copyright owners, copyrights, and those who support strengthening copyright law.<sup>52</sup> They do so in order to convince governments either to delay reforming the law in a way they oppose or to water down such reforms to make them ineffective in achieving their purpose.<sup>53</sup> Within the blogging community, their opinions have become popular myths and have acquired cultural momentum.<sup>54</sup>

Further, although occasionally giving lip service to the term “balance,”<sup>55</sup> copyright antagonists often advocate reforms that focus almost exclusively on broad new exceptions and “user rights”<sup>56</sup> to copy

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<sup>52</sup> See Brian Isaac, “Geist’s Unfounded Allegation of Copyright Policy ‘Recycling,’” *Hill Times*, (6 July 2009) (responding to allegations that the Canadian Anti-Counterfeiting Network (CACN) recommendations for copyright reform were tainted because other Canadian business organizations had made similar recommendations.)

<sup>53</sup> An example is the recommendation by Professor Geist and others that legal protection for TPMs be confined to prohibiting circumvention for the purposes of infringement. His recommendations for reforms are set in footnote 56, *infra*.

<sup>54</sup> On this phenomenon generally, see Idris, *supra* note 36.

<sup>55</sup> On the lack of balance and objectivity in Professor Geist’s copyright positions, see Barry B. Sookman, “‘TPMs’: A Perfect Storm for Consumers: Replies to Professor Geist,” (2005) 1 C.J.L.T. 4 at 23; Barry Sookman, “Facebook Fair Copyright of Canada: Replies to Professor Geist,” (2008) 1 Osgoode Hall Rev.L.Pol’y. 198 [Facebook]; Barry Sookman, “Copyright Reform: Let the Light Shine In”, *Hill Times* (23 October 23 2006); Claudette Fortier, Letter to the Editor, *Toronto Star* (6 December 2004).

<sup>56</sup> In Canada, acts that do not infringe are sometimes metaphorically called “user rights,” after being referred to as such by the Supreme Court in a leading fair-dealing copyright case: *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339. This reference to users’ rights was intended to emphasize that the fair-dealing defense to copyright infringement was not to be interpreted restrictively. The court’s decision is otherwise clear that “fair dealing” is a defense to infringement, one that the defendant has the procedural onus of proving. It is conceptually wrong to suggest that copyright law confers on users affirmative rights to access and use works or to exercise “rights” such as a right of fair dealing. Copyright is a negative right that confers on copyright holders the power to authorize the exercise of specific rights conferred by statute. Acts that are fair dealings with works or that fall within another exception to infringement simply do not infringe an exclusive right. There is a great deal of difference between the absence of right that prevents the use or access of a work by an owner of a work and a positive right of an owner of a work to perform an act that is not within the scope of an exclusive right of a copyright owner. Users do

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for “personal” and other uses. These calls for free copying are not constrained by any overarching principle or public policy rationale justifying such copying, except apparently that it is possible to do so.<sup>57</sup>

Moreover, these copyright antagonists ask the Government to undermine basic freedoms to license content under contract by recommending that contracts that impose limits on certain uses be rendered unenforceable.<sup>58</sup> These proposals could inhibit the creative industries’ ability to develop or grow legitimate innovative digital businesses.

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not have positive legal rights that they can assert against others, including copyright owners, to restrain them from interfering with, or to compel them to permit, acts, uses, or means of exploiting works not covered by exclusive rights.

<sup>57</sup> See, for example the proposals for reform made by Prof. Geist. In his submission to the Copyright Consultations, <http://www.michaelgeist.ca/content/view/4377/125/>, he asks for: an open ended fair use exception and broad exceptions to copy for time shifting, format shifting, music shifting, teaching, remixing of content and the right to make copies of any digital materials on CDs, DVDs, and video games. He also recommends that the Government remove the freedom to contract. On his site <http://speakoutoncopyright.ca>, Professor Geist starts his recommendation by stating that “balance and the dangers of excessive control should stand as a starting principle for reform.” He then goes on to make a series of recommendations that would neutralize the efficacy of key reforms in favor of rights holders and focuses almost exclusively on broad new exceptions or “user rights.” Here are some examples from his site and his “61 Reforms to C-61,” <http://speakoutoncopyright.ca/61-reforms-to-c-61>. First, protect technological measures (TPMs) from circumvention only for the purpose of infringement and provide no protection for circumvention tools or services. This proposal would not comply with the requirements of the WIPO Treaties and would provide almost no protection against circumvention activities (see below). Second, permit copying of all “digital data” for back-up purposes, presumably even where the form of media used is not vulnerable to deterioration. Third, expand the format-shifting exception to apply to digital as well as analog videos and permit circumvention of TPMs, including broadcast flags to accomplish this expansion. Fourth, allow time shifting of all Internet programming streams with no time or copy limits on the time-shifting exception; for example, permit the creation of permanent libraries of content. Fifth, permit ISPs to introduce network personal video recorders (PVRs). Sixth, permit circumvention of TPMs on music for time-shifting purposes and permit making copies from CDs that are not owned by the individual. Seventh, enact a broad fair-use exception. Eighth, do not enact a notice and takedown regime. Ninth, do not implement any graduated response system.

<sup>58</sup> See the proposal made by Prof. Geist: “Canada should identify the core protections and policies that underlie the copyright balance and establish rules that prohibit attempts to ‘contract out’ of such terms”, online: <http://www.michaelgeist.ca/content/view/4377/125/>.

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Our major trading partners have rejected such views and have not succumbed to this zero-sum, user-rights philosophy to diminish their resolve in adapting their laws to foster a dynamic digital culture. The European Union, for example, has made it clear that the “objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.”<sup>59</sup> They recognize that enacting a high level of protection for digital properties is good for all stakeholders, including consumers. They also recognize that granting rights to creators comes with burdens, that these burdens are legitimate and required,<sup>60</sup> and that they are ultimately beneficial to consumers.

The UK government explicitly acknowledged that the high levels of digital protection for works it proposed would be beneficial to consumers. In promoting its policy of implementing a graduated response system, the government stated the following:

Implementation of the proposed policy will allow right holders to better appropriate the returns on their investment, subsequently fostering further investment in content and ensuring the long term sustainability of the industry. This will ensure that high quality and diverse content is available to consumers ...

But this is not just about taking action against consumers. Most consumers, except the minority of the anarchic or those who believe in ‘freedom to’ without its counterbalancing ‘freedom from’, who believe in unsupported rights without countervailing duties, would prefer to behave lawfully if they can do so practically and with a sense of equity. A recent study in Scandinavia has shown that the biggest users of unlawful peer-to-peer material are also the biggest paid-for consumers of music. Where there are easy, affordable and lawful routes[, ] consumers will take them.<sup>61</sup>

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<sup>59</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Recital 22.

<sup>60</sup> On this issue, see Robert P. Merges, “IP Rights and ‘Creative Professionals,’” *The Media Institute* (25 March 2009).

<sup>61</sup> United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing* (16 June 2009) at 49, 109–10; There is good reason to believe that Canadian practices would be

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Technological advances that make it easier to infringe are not a rationale for legalizing these activities.<sup>62</sup> The arguments to the contrary by anti-copyright advocates should not drive public policy.

VIII. *Regard technology neutrality perhaps as a goal, although this principle has limitations*

If one thing is certain, it is that technology will change. Accordingly, copyright should be technologically neutral so that it will encompass technological advances. However, if history has taught us anything, it is that new technologies will pose new challenges that will constantly require revisiting established principles.<sup>63</sup> No generalized principle will ever be able to solve this problem.

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the same. A survey published in *Environics* in June 2008 that examined Canadians' attitudes toward intellectual property found that the vast majority of Canadians believe that intellectual property deserves the same respect and protection as other, more tangible goods. When asked to agree or disagree that "[m]usic, videos, computer software and books are all forms of intellectual property which deserve the same degree of protection from copyright theft as physical goods do from physical theft," more than eight in 10 Canadians (83%) agreed. It found that Canadians also overwhelmingly agree that "strong patent, copyright and trademark laws are required to protect those who create intellectual property for a period of time so that they can sell or commercialize their ideas before competitors are allowed to copy their creations." Fully nine in 10 Canadians (90%) supported the idea that products of the mind should be protected by such laws. In addition to creating – and enforcing – laws that protect intellectual property, a substantial majority of Canadians believe that government needs to play an active role in instilling a sense of respect for intellectual property among citizens, particularly online. Eight in 10 Canadians (82%) agree that "government has a responsibility to educate Canadians about the need to respect copyright laws on the Internet."

<sup>62</sup> A.A. Keyes et al., *Copyright in Canada: Proposals for a Revision of the Law*, Consumer and Corporate Affairs (April 1997) at 146: "The sheer impact of technology is another major factor accounting for demands for further exceptions. However, technological advances that make it easier to infringe copyright should not be a rationale for legalizing or permitting what is prohibited. There is no logic, for example, in exempting payment from the use of protected works because a photocopying machine is used."

<sup>63</sup> See Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law," Columbia Law School, Public Law and Legal Theory Working Paper Group Paper Number 8 at 8; Ginsburg makes the case for the right to control access to works as follows: "Even if an 'access' right does not precisely correspond to either of the traditional copyright rights of

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Further, because of the diversity of technologies, there can be serious unintended and inadvertent consequences in formulating a principle to apply to all present and future technologies in a neutral way.<sup>64</sup> Moreover, different policy goals and implications will often be associated with providing exclusive rights or exceptions for particular technologies.<sup>65</sup> It is not surprising, therefore, that the Act has long

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reproduction or public performance, it does respond to what is becoming the dominant way in which works are in fact exploited in the digital online environment. After all, there should be nothing sacred about the eighteenth- or nineteenth-century *classifications* of rights under copyright in a technological world that would have been utterly inconceivable to eighteenth-century minds. By contrast, the *justifications* offered by the Enlightenment-era framers of copyright policy should still guide us. While Madison could not have foreseen the Internet, he clearly believed that the private rights of authors furthered the general public interest in the advancement of learning, and he believed that at a time when printing presses were ‘growing much faster even than the population’ [see note 92]. As a matter of economic incentive to creativity, as well as the author’s right to the fruits of her intellectual labor, copyright should cover the actual exploitation of works of authorship. On that account, one should welcome the access right, new arrival though it might be.”

<sup>64</sup> The proposed exceptions for Internet intermediaries that were in Bill C-61 provide a good example of this problem. The exceptions were drafted in expansive “technologically neutral” language. As a result, they might well have provided safe harbors to pirate Internet sites and services such as pirate BitTorrent sites. The “network services exception” applied to any entity providing services related to the operation of the Internet or another digital network which provided any means for the telecommunication or the reproduction of a work through the Internet or a digital network. The exception could have been relied on by any illicit P2P file-sharing service. The “information location tool exception” applied to any service provider “that makes it possible to locate information that is available through the Internet or another digital network.” Because the exception was drafted in such broad “technologically neutral” terms, it could have been relied on by file-sharing services. In fact, isoHunt, one of Canada’s most notorious BitTorrent file-sharing services, alleged in a lawsuit brought against Canadian record companies that its services are indistinguishable from Google’s search-engine business. See also TorrentPortal, <http://www.torrentportal.com/>: “TorrentPortal is like Google™, in that it links only to torrent metafiles and takes a cache of such files. None of the data transferred by or stored on TorrentPortal servers is content linked to by torrent files.”

<sup>65</sup> For example, there may be different policy objectives and implications for an exception permitting copying for format shifting of analog versus digital content; or copying TV programs on home PVRs versus network PVRs; or permitting back-up copies to be made of computer software versus other digital content such as movies, video games, or music that are licensed under a subscription-based service model that is supported by a TPM.

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reflected the reality that certain technologies must be treated differently for policy reasons.<sup>66</sup>

Technology neutrality is not the silver bullet that solves the need to examine the consequences of proposed amendments and to make nuanced choices to meet policy objectives.

#### EIGHT PRINCIPLES TO GUIDE COPYRIGHT REFORM – NEW RIGHTS

##### I. *Amend the act to enable Canada to ratify the WIPO Treaties*

Canada has signed the WIPO Treaties but has resoundingly failed to implement them.<sup>67</sup> These treaties provide an internationally recognized norm for reducing digital piracy. All of Canada's major trading partners, including all members of the EU, the United States, Australia, and Japan, have enacted legislation to implement these treaties.<sup>68</sup>

##### II. *Provide protection against circumvention of TPMs that are required by the WIPO Treaties and that comport with international standards*

Legal protection for technological measures (TPMs) is a key requirement of the WIPO Treaties. TPMs act as enablers of innovative

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<sup>66</sup> For example, the Private Copying Regime in Part VIII of the Act applies to audio-recording media, not to digital audio devices such as iPods. See *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 (CA); Also, under section 31 of the Act, the retransmission exception applies to cable and similar retransmitters but not new media retransmitters.

<sup>67</sup> *Supra* note 25; In naming Canada to its Special 301 Priority Watch List, the United States Trade Representative stated: "The United States continues to have serious concerns with Canada's failure to accede to and implement the WIPO Internet Treaties, which Canada signed in 1997. We urge Canada to enact legislation in the near term to strengthen its copyright laws and implement these treaties." Congressional International Anti-Piracy Caucus, "2009 Country Watch List," May 2009.

<sup>68</sup> Some countries have not yet ratified the WIPO Treaties. However, ratification should not be confused with having enacted laws necessary to ratify the treaties. For instance, while all EU member nations have enacted legislation implementing the WIPO Treaties, most have yet to officially ratify the treaties.

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ecommerce services and new business models. They are fundamental to support versioning and consumer choice by enabling multiple options (at different prices) for accessing digital content.

Critics of legal protection for TPMs allege that they are no longer relevant or required in the digital landscape. This claim is not true. They are and will remain vital in supporting ecommerce in digital products.<sup>69</sup>

Opponents of legal protection for TPMs have given many reasons to support their position, including purported concerns about free speech, digital lockout, and privacy. None of these concerns when analyzed raises any reason not to protect TPMs.<sup>70</sup> Indeed, a recent study examining the impact of legal protection for TPMs on statutory exceptions to copyright in the United Kingdom found that the “nightmarish vision of digital lock-up” professed by opponents of anti-circumvention legislation had not materialized and that TPMs

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<sup>69</sup> While certain distributors of music have elected to release music that is TPM free, most content distributors have not. TPMs remain a key means of protecting digital content such as music, books, movies, TV programs, and business and entertainment software. Downloading and streaming films, renting them on-line, or buying a DVD with a bonus digital copy are services made possible because of TPMs. TPMs are currently in wide use by the cultural industries, some only outside Canada. For example, music download services: Zune Marketplace, RealNetworks (Helix & Harmony, Windows Media DRM, Wal-Mart Music Downloads, Sony Online “Connect”); music download subscription services (with a monthly fee for unlimited download): Napster, Rhapsody; video streaming websites that aim to prevent making copies so they can earn ad revenues: YouTube, CinemaNow, Hulu, Netflix Watch Instantly, TV.com, U.S. TV broadcaster websites (NBC, ABC, CBS, FOX, CNN, Comedy Central, etc.) (most use a form of TPM enabled by Adobe Flash); video download or rental sites: Blockbuster Online, Amazon Video on Demand, Filmkey (for Quicktime movies); DVD copy protection: CSS; Blu-Ray copy protection: Advanced Access Content System (AACS); ringtones: Open Mobile Alliance; software copy protection: SecureROM, SafeDisc, GameShield, CD Keys/Serials, online product activation (e.g., Microsoft Genuine Advantage, often used to allow updates and patches); online gaming: subscription fees tied to a single CD Key (used in online MMORPGs such as World of Warcraft), Star craft, and Diablo; online pc gaming services: new services such as Valve Corp.’s “Steam” or Stardock’s “Impulse,” which tether downloads to an online account rather than to a particular computer or device, enabling a consumer to access games at convenient times and locations (such as when traveling); gaming consoles: all major gaming consoles (Playstation, Wii, Xbox) use some form of TPM (e.g., ROM-Mark for Playstation 3); text document copy protection: Adobe Acrobat (PDFs), Amazon Kindle, Microsoft Reader.

<sup>70</sup> Sookman, “*TPMs’: A Perfect Storm for Consumers*”; Sookman, “Facebook” *supra* note 55.

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had not “impacted on many acts permitted by law.” Furthermore, the study also determined that, when beneficiaries of exceptions reported limited or no enjoyment of the exception, they were in many cases unable to provide any actual evidence in support of those claims; beneficiaries of exceptions who claimed to have been prevented from carrying out those permitted acts because of TPMs had not bothered to use the complaints mechanism set out under UK law.<sup>71</sup>

Opponents of legal protection for TPMs also argue that there is “considerable flexibility” in how to implement the WIPO Treaties. They assert that this flexibility extends to prohibiting circumvention only for the purposes of infringement and that there is no need to prohibit the trafficking in circumvention tools and services.<sup>72</sup> These claims exaggerate the scope for implementing the treaties.<sup>73</sup> In any

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<sup>71</sup> Dr. Patricia Akester, “Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment” (Paper for the University of Cambridge Faculty of Law, May 2009) at 101–2; See also June Besek, “Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts,” (2004) 27 Colum. J.L. & Arts 385, where, after a rigorous survey of the impact of anti-circumvention legislation in the United States, Professor Besek concludes that (a) “technological protections are not yet as pervasive or as intrusive as critics have feared. A host of legal, technological, and market factors work together to counter digital lockup and provide a safety valve to accommodate legitimate uses”; (b) “existing evidence does not support new statutory exemptions”; and (c) “we should allow the new types of digital deliveries that are promoted by [*Digital Millennium Copyright Act*] § 1201 the opportunity to continue to flourish.”

<sup>72</sup> See generally the comments of Michael Geist, online: <<http://speakoutoncopyright.ca>>

<sup>73</sup> Sookman, “Facebook” *supra* note 55; Heather A. Sapp, “North American Anti-circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada,” (2005) 1 Computer L. Rev. & T.J. 10 at 9, 34–35; These materials conclude that “the dominant view internationally is that legislation that prohibits only the circumvention of TPMs for the purpose of infringement would not be adequate and effective” and that any anti-circumvention legislation that “merely prohibits circumventing ‘copy controls’ rather than prohibiting the circumvention of ‘access controls’ and the trafficking in circumvention devices ... fails to meet the obligation under Article 11 of the WCT and Article 18 of the WPPT to provide adequate legal protection and effective legal remedies.” She also expresses the opinion that the TPM provisions in Bill C-60 would not have complied with the requirements of the WIPO Treaties; See also Mihaly Ficsor, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002) at 549–50; World Intellectual Property Organization (WIPO), *Guide to the Copyright and Related Rights Treaties*, (2004) English No. 891(E) at para CT-11.16; Michael Schlesinger, “Implementation of the WIPO Treaties beyond the U.S. and the EU,” Eleventh Annual Conference on International Intellectual Property Law and Policy (23 April



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event, these proposed anorexic forms of implementation would do nothing to support the policy objective of fostering ecommerce in digital products.<sup>74</sup>

### III. *Establish a “making-available right”*

The *WIPO Copyright Treaty* requires a making-available right for works. The making-available right has been used extensively in countries that have implemented the WIPO Treaties as a means of shutting down BitTorrent sites such as Pirate Bay and Finreactor. It makes proof of infringement much easier without requiring rights holders to collect information about file-sharing activities from individuals who download infringing files.

Bill C-60 had proposed that such a right be added to the Act for works and sound recordings.<sup>75</sup> Unfortunately, no right was expressly proposed in Bill C-61 for works.<sup>76</sup> This right is needed, yet there is uncertainty as to whether and to what extent it exists in Canada. It must be clarified in any future bill.

### IV. *Clarify the law related to secondary infringement to help address online piracy*

It is probable, but uncertain, that Canadian law provides relief for acts that induce or materially contribute to copyright infringement. Secondary infringement doctrines are essential for

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2003), Fordham University School of Law at 12–13; Some also contend that there is international precedent among our trading partners for this form of implementation and point to Denmark. Again, this assertion is not accurate. Denmark protects against the circumvention of TPMs without any requirement that the purpose be to infringe copyright; See Denmark, *Consolidated Act on Copyright 2003* – Consolidated Act No. 164 of (12 March 2003).

<sup>74</sup> Such an implementation would provide no protection against technologies such as “mod chips” that would enable pirated copies of DVDs or games to play on consoles and other digital players. It would also not protect the myriad different digital streaming, rental, and subscription-based models that depend on controlling access to meet paid-for plans.

<sup>75</sup> Bill C-60, *supra* note 5.

<sup>76</sup> Bill C-61, *supra* note 6.

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pursuing pirate online sites and services, and the law in this area must be clarified.<sup>77</sup>

V. *Implement a notice and notice system backed up by a nuanced graduated response process*

A “notice and notice” process is somewhat useful in dealing with infringing activity across P2P networks and other transitory network communications. It should become part of Canadian law. As previously noted, however, notice and notice is not effective in permanently stopping downloading unless the individuals receiving the notices believe that sanctions could be imposed unless they cease such activity.<sup>78</sup> Based on the evidence that unauthorized downloading *can* be significantly reduced through appropriate legal measures and determination to achieve this goal, countries such as France, New Zealand, the United Kingdom, South Korea, and Taiwan have enacted, or are in the process of developing, legislation to introduce a graduated response process in which rights holders and ISPs work together to curb infringements. Other countries are moving toward graduated response regimes through agreements between rights holders and ISPs.<sup>79</sup>

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<sup>77</sup> These theories have been successfully used around the world in combating illicit online file-sharing sites and services. See *MGM Studios v. Grokster*, [2005] 545 U.S. 913 (Distributor of P2P software); *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (P2P file share service); In *Re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) (P2P file share service); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (September 5, 2005) (with Corrigendum dated September 22, 2005 from Australia - Distributor of Kazaa P2P software); *Brein v. KPN*, [2007] Court of Den Hague, 5 January 2007 (Netherlands BitTorrent site); *Brein v. Leaseweb*, [2001] Dist. Ct. Amsterdam, 21 June 2007 (Netherlands ISP that hosts BitTorrent site [www.everlasting.nu](http://www.everlasting.nu)); *Prosecuting Authority v. A*, [2005] Oslo Trial Court, 27 May 2005 (the “DirectConnect” case); *TONO et al. v. Bruvik* [2005] Norwegian Supreme Court, 27 January 2005, case no. HR-2005-00133-A (Napster [P2P] site); *IFPI Danmark et al. v. DMT2 A/S* [2008] Court of Frederiksberg, Denmark, 29 January 2008, file no. FS 14324/2007 (PirateBay BitTorrent site).

<sup>78</sup> *Supra* note 75.

<sup>79</sup> In Ireland, the country’s largest ISP, Eircomm, agreed to implement graduated response as part of a settlement agreement ending an infringement suit brought by copyright owners. Japan’s four major Internet organizations, which represent about one thousand large and small domestic providers, agreed to a “graduated response”

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Opponents of graduated response processes have rejected “three strikes” proposals that would “cut off Internet access based on unproven allegations of infringement.”<sup>80</sup> However, the proposals Canada’s trading partners are examining are intended to provide a fair and efficient process for rights-holders to deal with repeat copyright infringement in the digital environment. The United Kingdom<sup>81</sup> and New Zealand<sup>82</sup> graduated response proposals provide for actual hearings before a special tribunal before any remedy is meted out. Further, the tribunals would be accorded considerable flexibility in the remedies they could order – remedies that would not necessarily involve any termination of user access to the Internet.

The government should ensure that rights holders and ISPs quickly reach agreement on a graduated response process. A new bill should include a power to enact necessary regulations to implement a fair and effective graduated response process.

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system to cut off Internet access for users who repeatedly copy music illegally online. The scheme is a voluntary agreement between the ISPs and copyright holders, with copyright holders using monitoring software to identify people who repeatedly make copies illegally and then notify the appropriate ISPs. The ISPs send warning emails to the users in question; if the illegal copying doesn't stop after that, the providers will either temporarily disconnect these users' Internet access or cancel their contracts altogether. The agreement was signed in March 2008. In December 2008 the U.S. recording industry announced that it was working with the attorney general of New York state and leading ISPs on a series of voluntary online anti-piracy initiatives. In a separate and parallel move, the Recording Industry Association of America (RIAA) and several leading ISPs agreed on principles under which ISPs will take responsibility to send notices and institute a program of escalating sanctions for subscribers who are repeat copyright infringers. ISPs in the United States have an incentive for a graduated response mechanism because they do not qualify for safe harbors under the *Digital Millennium Copyright Act (DMCA)* unless they have a policy to curb infringement by their subscribers and have reasonably implemented it. Singapore is also considering a graduated response system. See <[http://www.pcworld.com/article/170484/report\\_singapore\\_considers\\_three\\_strikes\\_antipiracy\\_law.html](http://www.pcworld.com/article/170484/report_singapore_considers_three_strikes_antipiracy_law.html)>.

<sup>80</sup> Professor Geist states: “Do not establish a three-strikes and you’re out system that removes Internet access based on unproven allegations of infringement.” See online: <<http://speakoutoncopyright.ca/my-short-answer>>.

<sup>81</sup> United Kingdom Department for Business Enterprise and Regulatory Reform, *Consultation Document on Legislation to Address Illicit P2P File-Sharing* (16 June 2009); United Kingdom Department for Business Enterprise and Regulatory Reform, *Digital Britain – Final Report* (June 2009).

<sup>82</sup> New Zealand Ministry of Economic Development, “Section 92A Review Policy Proposal Document,” (14 July 2009).

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VI. *Implement a notice and takedown system that fully respects due process considerations*

Canada should adopt a formal “notice and takedown” regime. “Notice and notice” and “notice and takedown” are complementary methods of dealing with online file sharing. They have often been portrayed as mutually exclusive processes. They are not. Notice and notice may be somewhat useful in dealing with P2P file sharing; notice and takedown is necessary to deal with files that are hosted by the ISP.

Notice and take down is very effective in dealing with infringements on systems being stored or hosted on a system or network controlled or operated by a service provider.<sup>83</sup> It is a de facto standard in the European Union and in many other countries that permits service providers to rely on hosting exceptions only if they remove or disable access to infringing content when they have knowledge of infringement.

Other countries such as Finland, Iceland, Australia, Singapore, and the United States have a more formalized process that expressly attempts to balance the needs of rights holders to remove infringing content quickly from the Internet with the rights of users who may object to the removal. Under these regimes, infringing content can be expeditiously removed from a site on delivery of a notice of claimed infringement and be restored by a counter notice from the content poster.

To ensure due process, under legislation like the *Digital Millennium Copyright Act (DMCA)*, the notice of claimed infringement must be sworn under penalty of perjury.<sup>84</sup> The claimant has a duty to consider in good faith all defenses to infringement that the poster may have, including a fair-use defense.<sup>85</sup>

Opponents to notice and take down claim that it deprives alleged copyright infringers of the benefit of due process. That is

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<sup>83</sup> Mihaly Ficsor, *Effective Enforcements of Intellectual Property Rights*, WIPO, Doc. WIPO/IP/TIP/03/10b, (describing an IIPA survey charting the system from January 1, 2001, to June 30, 2002).

<sup>84</sup> [\*Digital Millennium Copyright Act\*](#), 17 U.S.C. (1998) [*DMCA*].

<sup>85</sup> *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (ND Cal. 2008).

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arguably true under the de facto model, where no formalized notice and counter-notice process is available. This model is currently in use in Canada, where ISPs that do not remove infringing content when they become aware of it may be liable for infringement.<sup>86</sup> Thus, a formalized notice and take down regime could actually benefit content posters as well as rights holders and ISPs by spelling out the specific rules that would apply. A study prepared for Industry Canada expressly determined that a notice and take down regime would be a viable process for ISPs and could adequately balance the interests of rights holders and users.<sup>87</sup> The Supreme Court also recommended that Canada enact a notice and take down process as “an effective remedy” to resolve what content should be removed from websites.<sup>88</sup>

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<sup>86</sup> *Public Performance of Musical Works 1996, 1997, 1998*, 2004 SCC 13 at paras. 110, 127 [*Tariff 22*].

<sup>87</sup> Paul Chwelos, “Assessing the Economic Impacts of Copyright Reform on Internet Service Providers,” *Report Prepared for Industry Canada*, (November 2003) at 30-31: “One of the objections to the Notice and Takedown approach is that it is a ‘shoot first and ask questions later’ or ‘guilty until proven innocent’ approach that deprives alleged copyright infringers the benefit of due process and judicial oversight. The force of this argument will depend critically on the implementation of the Notice and Takedown system. For example, the US system allows an alleged infringer to file a counter-notification in order to have content reinstated after a 10-day waiting period. The waiting period allows time for the complainant to obtain a court order prior to the content being reinstated. The administrative mechanisms of notice, counter-notice, and waiting periods before takedown (if any) and reinstatement, as well as any accelerated judicial process for obtaining court orders[,] provide for many tools with which legislation can attempt to balance the rights of ISP clients and copyright holders.” “In terms of the international competitiveness of Canadian ISPs, the Notice and Takedown approach will likely put Canadian ISPs on nearly identical competitive footing to US and EU ISPs in terms of copyright liability.”

<sup>88</sup> *Tariff 22*, *supra* note 83 at paras. 125, 127: “Under the European *E-Commerce Directive*, access to cached information must be expeditiously curtailed when the Internet Service Provider becomes aware of infringing content. At that time, the information must be removed or access disabled at the original site (art. 13(1)(e)). Under the U.S. *Digital Millennium Copyright Act*, those who cache information are not liable where they act expeditiously to remove or disable access to material once notice is received that it infringes copyright (s. 512(b)(2)(E)). If the content provider disputes that the work is covered by copyright, the U.S. Act lays out a procedure for the resolution of that issue.” “The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did ‘(g)ive approval to; sanction, permit; favour, encourage’ (*CCH*, para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by ‘taking it down,’ may in some circumstances lead to a finding of

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VII. *Enable rights holders to obtain injunctions against Internet intermediaries to prevent infringements*

Canadian law does not provide copyright holders with any right to apply for injunctions against intermediaries whose services are used by a third party to infringe. This right, prescribed by the *EU Copyright Directive*,<sup>89</sup> has proved valuable in combating online file sharing.<sup>90</sup> It could also prove useful in Canada.

VIII. *Implement fair and effective border measures to protect against the import of pirated goods*

Canada should prohibit the importation and exportation of pirated goods. It should also establish a recordation system to assist customs officers in the seizure of pirated goods. The Canada Border

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‘authorization.’ However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of ‘authorization’ would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory ‘notice and takedown’ procedure as has been done in the European Community and the United States.”

<sup>89</sup> EU Copyright Directive, Art. 8(3). In France, for example, the law on digital economy created a special injunctive relief procedure against access or hosting services (Art. 6.8). It allows a judge to take any measures to put an end to the damage caused by the content of a service. In France, rights holders have obtained many orders from the courts requiring ISPs to terminate the accounts of infringing users.

<sup>90</sup> IFPI *Denmark v. DMT2 A/S*, Frederiksberg Fogedrets Kendelse FS 14324/2007, 5 February 2008, Bailiff’s Court of Frederiksberg (Copenhagen) (Danish ISP ordered to block access to the world’s most active BitTorrent site, [thepiratebay.org](http://thepiratebay.org)); Also *IFPI Denmark v. DMT2* (October 25, 2006, Denmark) – Danish ISP ordered to block access to the controversial Russian music downloading site AllofMP3.com; *Brein v. KPN*, [2007] Court of Den Hague, 5 January 2007 (Netherlands – ISP KPN ordered to cease providing connectivity services to the [dutchtorrent.org](http://dutchtorrent.org) site); *Brein v. Leaseweb*, Dist. Ct. Amsterdam, 21 June 2007 (Netherlands – ISP ordered to cease providing connectivity to [www.everlasting.nu](http://www.everlasting.nu) BitTorrent website); *SABAM v. Tiscali (Scarlet)* Dist. Ct. Brussels, 28 June 28 2007 (Belgium); also further ruling October 22, 2008, Tribunal De Premiere Instance de Bruxelles – Belgium ISP Scarlet compelled to install filtering software on its routers to block P2P file sharing over its networks.

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Services Agency should have the authority to target, detain, seize, and destroy pirated goods on its own initiative.

THREE SPECIFIC RECOMMENDATIONS TO GUIDE COPYRIGHT REFORM –  
NEW EXCEPTIONS FROM INFRINGEMENT

I. *Clarify that ISPs are not liable for infringement when they act as true intermediaries*

ISPs play a crucial role in enabling the digital distribution of content. A new bill should clarify their liability when they act as truly innocent intermediaries. The ISP provisions in Bill C-61 need some technical amendments, however, as they could have inadvertently provided legal immunities to sites that knowingly and for profit purposes materially facilitated illegal online file sharing. The exceptions, as drafted, also materially deviated from the more narrowly tailored wording in similar international legislation.<sup>91</sup>

II. *Establish new exceptions to facilitate private uses of works where justified, and do not adopt “fair use” or an “expanded fair dealing” provision*

As part of the consultation process, calls have been made for a general fair-use exception. Alternatively, some advocates for reform have asked for an open ended, expanded fair dealing exception. The most common proposal is to insert the term “such as” into the current fair dealing provision for research and private study.<sup>92</sup> This proposal, has been held up as a technologically neutral “silver bullet” that would satisfy the plethora of specific exceptions that have been asked

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<sup>91</sup> They also were not conditioned on ISPs having or reasonably implementing any policy to deal with repeat infringers.

<sup>92</sup> The “expanded fair dealing” proposal would have the same effect as a fair use provision, as it would create an open-ended system allowing users to argue that any given purpose is “fair”. In this paper a reference to “fair use” is meant to include an open ended expanded fair dealing model because they would have the same effect.

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for.<sup>93</sup> But adopting fair use would simply replace one set of problems with other ones.

My reasons for believing that Canada should not adopt a fair use or an expanded fair dealing provision are set out in detail in a paper submitted as part of this consultation process by over forty prominent Canadian organizations, who represent hundreds of thousands of artists, choreographers, composers, directors, educators, illustrators, journalists, makers, musicians, performers, photographers, playwrights, producers, publishers, song writers, videographers, and writers working in Canada.<sup>94</sup>

In summary, the doctrine of fair use is open ended and vague. It introduces considerable uncertainty and leaves consumers, businesses, and copyright owners unsure of what is legal and what is not. High transaction and legal costs are associated with determining what is a fair use, and the absence of any significant case law would necessitate litigation in order to determine the scope and limits of the doctrine. By contrast, considerable flexibility and certainty can be achieved by enacting specific fair-dealing exceptions.

The fair-use model has also proved problematic in the United States. One scholar concludes: “[T]he doctrine seems ill-defined at best, and empty at worst.”<sup>95</sup> Another wrote: “Both abstractly and concretely, however, fair use has been spectacularly unsuccessful as a substantive player in copyright theory and practice. Fair use has become too many things to too many people to be much specific value to anyone.”<sup>96</sup>

The problems with the fair-use model were recognized by the House of Common Sub-Committee on the Revision of Copyright in its

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<sup>93</sup> For example, Professor Geist says: “A more flexible fair dealing provision would address many of the current concerns associated with Canadian copyright law. By opening up fair dealing, Canadian law could ensure that user rights extend to parody and satire as well as to format shifting, time shifting (recording television shows), and device shifting. It could cover transformative works to ensure that remix creativity is adequately protected and it could ensure that the law is technologically-neutral.” See <http://speakoutoncopyright.ca/my-short-answer>.

<sup>94</sup> See, Barry Sookman and Dan Glover, “Why Canada Should Not Adopt Fair Use”, Joint Submission to the Copyright Consultations (13 September 2009).

<sup>95</sup> Darren Hudson Hick “Mystery and Misdirection: Some Problems of Fair Use and Users’ Rights,” (2009) 56 Copyright Society of the U.S.A Journal 500.

<sup>96</sup> Michael J. Madison, “Rewriting Fair Use and the Future of Copyright Reform,” (2005) 23 Cardozo Arts & Ent. L.J. 391.



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report *A Charter of Rights for Creators*. That report specifically recommended that the “fair dealing provisions should not be replaced by the substantially wider ‘fair use’ concept.”<sup>97</sup> Further, a study, recently published by Professor Giuseppina D’Agostino of Osgoode Hall Law School, also identified numerous problems with fair use and concluded that the formulation of a Canadian model would have to consider myriad factors before settling on what would make sense for Canada.<sup>98</sup>

Moreover, fair use systems are models that many of our trading partners including the United Kingdom, the European Union, Australia and New Zealand have expressly rejected. In fact, worldwide, only four countries have implemented a fair use system.<sup>99</sup>

It would be unwise to try to solve the current challenge posed by digital technologies by adopting an exception that has proved to be problematic where it has been tried. Any proposed exceptions for personal uses under a new bill should be scrutinized for compliance with the three-step test. Their impact on other parts of the Act, such as the existing detailed exceptions and the present and future private copying regimes, also need to be carefully considered.<sup>100</sup>

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<sup>97</sup> Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators*, October 1985, 63–66: “... fair dealing has worked well ... The Sub-Committee is of the view that [fair dealing] should be retained. It settles many potential lawsuits at an early stage. The wider approach in the United States has given rise to much litigation there, and has caused the issue to be raised as a matter of course in all copyright actions. It has created rather than curtailed the uncertainty surrounding the concept.” This recommendation was endorsed by government in the *Government Response to the Report of the Sub-Committee on the Revision of Copyright*, February 1986, paras. 82–86.

<sup>98</sup> Professor Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use,” (2007) 3 *Comparative Research in Law and Political Economy* 4 (for example, its potential impact on the existing and future private copying regimes and on other exceptions in the Act would need to be studied).

<sup>99</sup> The only fair use regimes are the United States, Israel, Singapore, and the Philippines.

<sup>100</sup> Bill C-61 would have introduced three new format and time-shifting exceptions for private uses of works: format shifting of music to permit copying of legitimately acquired music onto digital audio devices such as iPods; format shifting of books or video cassettes onto another digital medium or device; and time shifting to permit copying of TV programming and simulcasts for later listening or viewing.

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III. *Establish new educational and library exceptions in accordance with the three-step test*

Bill C-61 proposed several new exceptions for educational institutions and libraries.<sup>101</sup> Exceptions that facilitate access to copyright materials for educational and library purposes that strictly comply with the three-step test may be appropriate. Some of the exceptions proposed in Bill C-61, however, need serious reconsideration.<sup>102</sup>

CONCLUSION

In terms of copyright, Canada is at a crossroads. It can bow to the pressures of those who do not believe in it and enact weak and ineffective laws. Or it can follow the lead of its important trading partners, such as the United Kingdom, which believe that copyright can foster legitimate, vibrant markets for creative products and set specific goals, backed up by supporting laws to achieve this objective. Creating a “Digital Canada” for creative products is in the public interest. The alternative would be a mistake of long-term tragic proportions for Canada.

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<sup>101</sup> Bill C-61, *supra* note 6.

<sup>102</sup> For example, the exception for “works available through the Internet” might have legalized copying all online works not protected by TPMs, unless the copyright owner complied with certain marking formalities. It also had no limitations on the fairness or extent of the copying. The inter-library loan exception might also have seriously undermined publishers’ electronic distribution models.

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## APPENDIX: SUMMARY OF RECOMMENDATIONS

### *Principles to guide copyright reform*

1. Recognize the importance and the unique characteristics of the creative sector.
2. Establish specific goals for a “Digital Canada” copyright framework.
3. Provide effective digital copyright protection to stimulate intellectual creation and dissemination of cultural products.
4. Provide clear, predictable, and fair rules that support creativity and innovation.
5. Reform and adapt copyright laws to reduce digital piracy and to promote investment and economic growth in creative products.
6. Reform and adapt copyright laws with new exceptions in accordance with international standards and treaties.
7. Do not regard copyright reform as a “zero-sum game” or succumb to the philosophy of unrestricted user “rights.”
8. Regard technology neutrality perhaps as a goal, although this principle has limitations.

### *Specific recommendations for copyright reform*

1. Amend the Act to enable Canada to ratify the WIPO Treaties.
2. Provide protection against circumvention of TPMs that are required by the WIPO Treaties and that comport with international standards.
3. Establish a “making-available right.”
4. Clarify the law related to secondary infringement to help address online piracy.
5. Implement a notice and notice system backed up by a nuanced graduated response process.
6. Implement a notice and takedown system that fully respects due process considerations.

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7. Enable rights holders to obtain injunctions against Internet intermediaries to prevent infringements.
  8. Implement fair and effective border measures to protect against the import of pirated goods.
  9. Clarify that ISPs are not liable for infringement when they act as true intermediaries.
  10. Establish new exceptions to facilitate private uses of works where justified, and do not adopt “fair use” or an “expanded fair dealing” provision.
  11. Establish new educational and library exceptions in accordance with the three-step test.